88-185

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

PETER J. PALUGHI, Petitioner

v.

CITY OF MOBILE, A MUNICIPAL CORPORATION; GARY GREENOUGH, LAMBERT MIMS, and ROBERT DOYLE, Individuals, Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

Arthur J. Madden, III
MADDEN & SOTO
465 Dauphin Street
Mobile, Alabama 36602
(205) 432-0380

PETITION FOR CERTIORARI

TO THE ALABAMA SUPREME COURT

QUESTION PRESENTED FOR REVIEW

WHETHER A MUNICIPALITY IS REQUIRED TO AFFORD A PROPERTY OWNER NOTICE AND AN OPPORTUNITY TO BE HEARD, PRIOR TO CONDEMNATION, WHERE THE MUNICIPAL ENABLING RESOLUTION PROVIDES THAT PROPERTY OTHERWISE SUBJECT TO CONDEMNATION MAY BE EXEMPTED FROM ACQUISITION UPON DETERMINATION BY THE CITY THAT THE PROPERTY HAS BEEN REHABILITATED OR REDEVELOPMENT AND/OR THAT CONDITIONS EXIST TO THE EXTENT THAT THE PROPERTY SATISFIES THE OBJECTIVES OF THE PLAN?

PARTIES

Parties to the proceeding below are set out in the caption of the case.

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PREVIOUS OPINIONS

The matter has twice before the Alabama Supreme Court; first, on petition for writ of mandamus and most recently, on direct appeal. The opinion on mandamus is reported as Ex Parte Palughi, 494 So.2d 404 (Ala. 1986). The opinion on direct appeal is reported as Palughi v. City of Mobile 526 So.2d 1 (Ala. 1988). The opinion on direct appeal is also set out in the Appendix to this petition.

JURISDICTION

The Alabama Supreme Court, by written opinion, Palughi v. City of Mobile, So.2d (1988) affirmed the trial court, rehearing was denied on April 29, 1988. This court has jurisdiction to review by way of petition for writ of certiorari,

the decision of a state court of last resort pursuant to 28 USC Section 1257(3).

CONSTITUTIONAL PROVISIONS STATUTES AND ORDINANCES

1. Fifth Amendment to the Constitution of the United States.

2. Alabama Code (1975) Section 24-3-3.

The text of these provisions is set out in the Appendix to this petition.

STATEMENT OF THE CASE AND FACTS

In December of 1984, the city of Mobile filed a petition in the Probate Court of Mobile County seeking to condemn Appellant's property, located in Fort Conde Village, a historic area of the city. After the hearing, the Probate Court granted the condemnation petition. Appeal was then taken to the Circuit Court of Mobile County. Prior to trial

in the circuit court, this matter was before the Alabama Supreme Court in Ex Parte Palughi 494 So.2d 404 (Alabama 1986), a petition for writ of mandamus. In that proceeding, the Alabama Supreme Court held the trial court erred in severing Appellant's counterclaims and remanded for trial. On October 28, 1986, the court entered a final order of condemnation and awarded Palughi $150,000 for his property.

On December 2, 1986, appeal was taken to the Alabama Supreme Court which affirmed in Palughi v. City of Mobile, 526 So.2d 1 (Ala. 1988), rehearing denied April 29, 1988.

Simply put, this petition asks the court to establish the point when a municipality in the exercise of its powers of eminent domain, moves from acting in a legislative capacity to acting in a judicial capacity, thus triggering the

due process rights of notice and an opportunity to be heard.

Fort Conde Village is a collection of historic structures (with a few modern buildings), located near downtown Mobile Alabama. In 1973, the city acted to revitalize the area which had fallen into a state of decay. The city, together with a local bank, offered various incentives to private individuals to invest in and rehabilitate Fort Conde property. Palughi, a lawyer, was among those responding to the appeal. He purchased and restored a two-story house which he used as living quarters and a law office.

Despite the city's efforts, one by one the commercial ventures in the village failed and by 1983, most of the property in the area vacant and for sale. Palughi's law office, and Rousso's, a restaurant, were two of only a handful of

enterprises left functioning in the area at the time this case arose.

In March 1984, the City of Mobile adopted a municipal resolution, which incorporated the Mobile Community Development Plan for the Fort Conde area. The resolution and the plan which it adopted permitted the city, under appropriate state enabling authority (Alabama Code) 1975 Section 24-3-1, to acquire the property within the development area through the use of the city's eminent domain powers. The land acquired was to be ultimately conveyed to a private developer.

This petition turns on whether the following "exemption" language in the rehabilitation plan afforded Palughi a due process right to notice and opportunity to be heard regarding the exemption of his particular piece of property from the general condemnation.

The plan provided that Fort Conde Village property "... may be exempted from acquisition upon determination by the City of Mobile that said properties have been rehabilitated or redeveloped and/or conditions exist to the extent that property satisfy the objectives of the plan." The redevelopment plan contains no standards or procedures to govern which property is to be exempt from acquisition, nor do they contain a mechanism by which a property owner could seek to demonstrate to the city that his property met the criteria for exemption.

Palughi resisted the taking of his property in informal negotiations with various city officials, and once condemnation was undertaken, he resisted the taking in the Mobile County Probate Court, the Circuit Court of Mobile County, Alabama, and the Alabama Supreme Court. In each of these courts, he

raised the constitutional issue that the exemption language was without standards and afforded no procedure by which he could demonstrate his property qualified for exemption.

Palughi's property was ultimately taken by condemnation while the Rousso's Fort Conde property within the plan boundaries was exempted from acquisition, both without hearings.

REASONS WHY THE WRIT SHOULD BE ALLOWED.

The City of Mobile, acting in its legislative capacity, had the unquestioned right to determine that all of the property within Fort Conde Village, including Petitioner's property, was suitable for redevelopment under the authority granted by Alabama Code (1975) Section 24-3-1 et. seq. Petitioner does not contend such determination exceeded the City's police powers, nor that the property targeted for redevelopment and ultimately acquired was not for a public use. In short, Petitioner has no quarrel with the principles set out in Berman v. Parker, 348 US 26 (1954) and reaffirmed recently in Hawaii Housing Authority v. Midkiff, 467 US 229 (1984).

What sets this case apart from the usual condemnation case, and what makes granting of the writ appropriate, is that the City established an exemption

mechanism for certain otherwise included property in the plan area. The exemption language in the Fort Conde Redevelopment Plan is specific:

> "[Substandard or blighted] properties may be exempted from the acquisition upon determination by the City of Mobile that said properties have been rehabilitated or redeveloped and/or that conditions exist to the extent that said property satisfies the objectives of the plan."

The exemption provision is a legislatively created substantive right which cannot be denied without constitutionally adequate procedures. See Cleveland Board of Education v. Loudermill, 470 US 532 (1985). Having created an entitlement to an exemption for properties satisfying the objectives of the plan, the City implicated the requirements of due process and was required to afford procedural protections

to the Petitioner and all other property owners affected by the redevelopment plan.

An analogous situation can be found in the Cape Code National Seashore Act, 16 USC Section 459b-3(b). There, Congress provided the Secretary of the Interior with authority to acquire property in the exercise of the power of eminent domain. The act created an exemption for "improved property". In United States v. 7.92 Acres of Land, 769 F.2d4 (1st Cir., 1985) the court considered whether the landowner appealing from condemnation was entitled to the "improved property" exemption, there holding that the exemption was not applicable.

The importance of United States v. 7.92 Acres of Land is evident. Because the statue authorizing the exercise of the powers of eminent domain provided for

an exemption, the reviewing court addressed not only the question of public purpose and just compensation, but also the application of the improved property exemption.

Here, Palughi raised the issue of his entitlement to the exemption in correspondence with the City prior to condemnation in the probate court, in the circuit court, and on appeal to the Alabama Supreme Court. The opinion of the Alabama Supreme Court does not address the constitutional issued raised by the exemption language and rehearing was sought in that court solely on the constitutional question. Palughi has never been afforded a forum to demonstrate his property was entitled to the legislatively created exemption.

The fundamental requisites of due process are notice to interested parties and an opportunity to be heard at a

meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 US 319, 335 (1976). The need for some form of pre-condemnation hearing with respect to the exemption provision is evident from a balancing of the competing interest at stake. These are the private interest in protecting and retaining private property, and the public interest in rehabilitation and avoiding unnecessary expenditure of tax dollars. The discretion reflected in the exemption language would be better informed and the risk of error reduced had Petitioner been provided a hearing.

Palughi's right to continued use and enjoyment of his property is deserving of at least the protection afforded a student before suspension, Goss v. Lopez 419 US 565 (1975), or a driver before suspension of his license, Bell v. Burson 402 US 535 (1971), or a welfare recipient

prior to termination of benefits, Goldberg v. Kelly 397 US 254 (1970).

Petitioner should have had an opportunity to demonstrate that his property had been rehabilitated or met the objectives of the redevelopment plan. Because he was denied that right, the condemnation violated his Fourteenth Amendment right to due process of law and should not stand.

Arthur J. Madden, III
MADDEN & SOTO
465 Dauphin Street
Mobile, AL 36602
(205) 432-0380

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 28th day of July, 1988, served a true and correct copy of the foregoing document upon John L. Lawler, Attorney at Law, P. O. box 3085, Mobile, Alabama 36652 and James C. Wood, Attorney at Law, 1010 Van Antwerp Building, Mobile, Alabama, 36602 by first class Mail, properly addressed, postage prepaid.

Arthur J. Madden, III

APPENDIX A

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1987-88

Peter J. Palughi

86-310 v.

City of Mobile, et. al.

Appeal from Mobile Circuit Court

SHORES, JUSTICE.

This is an appeal from a condemnation case in which the trial court granted the City of Mobile's December 1984 petition to condemn property of Peter Palughi for use in a downtown redevelopment project. The petition was granted by the Mobile County Probate court, and Palughi appealed to the Circuit Court of Mobile County for a trial de novo. In the Circuit Court, Palughi filed an amended answer, which included numerous affirmative defenses

based on alleged "wrongful condemnation"; a compulsory counterclaim against the City; and a third-party complaint against three former city commissioners. The counterclaim and the third-party complaint were based on the same wrongful condemnation theories as Palughi's affirmative defenses. The case was tried in the circuit court beginning October 20, 1986.

At the close of all the evidence, the trial judge granted the condemnation, and directed verdicts in favor of the three former city commissioners on the third-party complaint. The issue of compensation and the wrongful-condemnation counterclaim were submitted to the jury, and Palughi was awarded $150,000 as compensation. However, the jury could not reach a decision concerning the counterclaim. Consequently, the city filed a motion for

judgment notwithstanding the verdict, as to the counterclaim on the ground of res judicata or collateral estoppel, asserting that the court's decision that the condemnation was lawful barred the jury's consideration of the wrongful-condemnation counterclaim. This motion was granted, and Palughi appealed.

The first issue raised is whether the trial court erred in ruling that the City of Mobile could lawfully condemn Palughi's property. Private property may be condemned if it is being taken for a recognized public use, and the owner is compensated for his loss. Nicrosi v. City of Montgomery, 406 So. 2d 951 (Ala. Civ. App. 1981). Whether a condemnation is for the public good is a question to be determined by the trial court. Section 18-1A-151, Code of Alabama (1975). Therefore, because the Alabama state legislature has recognized downtown

redevelopment projects as promoting the public good and the general welfare (see Section 24-3-1 et seq.), and because Palughi was awarded $150,00 by the jury as compensation, we hold that the trial court was correct in granting the city's condemnation petition.

The second issue presented is whether the trial court erred when it entered a judgment notwithstanding the verdict, in favor of the City on Palughi's counterclaim. This counterclaim was based on the theory that the City's condemnation of Palughi's property was unlawful, the same theory upon which Palughi's unsuccessful affirmative defenses had been based. Consequently, once the court decided, correctly, that the City had the right to condemn, and the jury fixed the compensation award for the taking, there could be no recovery on the counterclaim for

wrongful condemnation.

The final issue raised by Palughi is whether the court entered the order of condemnation before it heard all of the evidence. The basis of this argument is an unsigned, uninitialed, entry on the case action summary sheet which indicates that an order of condemnation was entered on October 20, 1986, the first day of the week-long trial. From this, Palughi argues that the court prejudged his case. We disagree.

Upon learning of the October 20, 1986 entry on the case action summary sheet, the City filed a motion to correct a clerical mistake in accordance with A.R.Civ.P. 60(a). A hearing was held, and the motion was granted. At the hearing, evidence was presented that the October 20 entry was a mistake, and that it was made as the result of the routine procedure followed by the Mobile County

Clerk's office in condemnation cases, rather than at the instruction of the trial court. Furthermore, the case action summary sheet contains a second order or condemnation, entered October 28, at the close of the trial. In contrast to the October 20 order, this October 28 entry was a written order signed by the trial judge.

After reviewing the hearing transcript, we hold that the trial court did not prejudge Palughi's case, and that the court's ruling to allow correction of the case action summary sheet was supported by the evidence. Consequently, the trial court's order of condemnation and the judgment notwithstanding the verdict are due to be affirmed.

AFFIRMED.

Torbert, C. J., and Jones, Adams, and Steagall, JJ., concur.

APPENDIX B

UNITED STATES CONSTITUTION, AMENDMENT V

...nor shall private property be taken for public use, without just compensation.

APPENDIX C

ALABAMA CODE (1975)

Section 24-3-3.

Any urban renewal project undertaken pursuant to Section 24-3-2 shall be undertaken in accordance with an urban renewal plan for the area of the project. As used in this chapter, an "urban renewal plan" means a plan, as it exists from time to time, for an urban renewal project, which plan shall conform to the general plan for the municipality as a whole and shall be sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements and rehabilitation as may be proposed to be carried out in the area of the urban renewal project, zoning and planning changes, if any, land uses, maximum densities, building requirements and the plan's relationship to definite local

objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities and other public improvements. An urban renewal plan shall be prepared and approved pursuant to the same procedure as provided in chapter 2 of this title, with respect to a redevelopment plan. (Acts 1955, No. 553, p. 1210, Section 3.)